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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 61

GERTRUDE KAY, ALIAS GERTRUDE KLEIN,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITIONER'S REPLY BRIEF.

POINT I.

New points raised for the first time by the Government: (a) That Counts 5 and 15 may be sustained under Section 35 of the Criminal Code and (b) That judgment on Count 12, to which a plea of guilty was withdrawn is in effect a judgment by consent—cannot be considered; and if considered, must be rejected.

1. *New Points Cannot be Considered.*

While the Government in its brief repeatedly asserts that the petitioner is estopped to make certain claims (p. 59)

and expressly argues that she cannot make a new point—"No such question, we submit, may now be raised" (p. 40), no such restrictions apparently control the Government!

Fortunately, the very cases which the Government cites in support of the right to present new points prove that they are not applicable to a criminal case. In an action involving the validity and infringement of a patent, the defendants might have urged a point as to invalidity, decided against them in the Circuit Court of Appeals, without applying for a cross writ of certiorari (*Stelos Co.* v. *Hosiery Corps,* 295 U. S. 237); in an admiralty suit to limit liability, a ground rejected in the Circuit Court may be urged by respondent to sustain the judgment in the Supreme Court (*Langnes* v. *Green,* 282 U. S. 531); and substantially the same ruling was made in a case involving an order of the *Interstate Commerce Commission* v. *American Ry. Express Co.,* 265 U. S. 475. So in a proceeding under the Anti Trust Law, the respondents could show that the judgment below, although given on untenable grounds, is right and should be affirmed. *Farmers Guide Co.* v. *Prairie Co.,* 293 U. S. 268.

Besides, in other cases, cited in the Government's brief, more nearly resembling the situation in this appeal, this Court has refused to consider points not considered in the courts below. In *Zellerbach Co.* v. *Helvering,* 293 U. S. 172, p. 182, the Court said:

> "No such point was considered by the Court below, nor was it suggested either in the petition for certiorari or in any response thereto. Review by this Court will be limited accordingly".

The same policy was pursued in *Lynch* v. *U. S.,* 292 U. S. 571, 588. The alleged defect that the suit was not brought within the period allowed by law was not reviewed because it was not pleaded nor brought to the attention of the courts

below nor by the solicitor general to the attention of the Supreme Court when opposing the petition for a writ of certiorari. And in *Burnet* v. *Commonwealth Improvement Co.*, 287 U. S. 415, where the Board of Tax Appeals expressed no opinion as to the Commissioner's method of reckoning, and where the respondent relied entirely on another point, on which alone the Circuit Court ruled, the Supreme Court would not undertake to determine what was not considered below.

This restriction on the review of new points has been equally applied to defendants. In *Rosenthal* v. *N. Y.*, 226 U. S. 260, 272, when the defendant tried to invoke for the first time the prohibitions against *ex-post facto* laws, the Court replied:

> "It is sufficient to say that no such point appears to have been raised in the Court below, although it might have been raised by an application for rehearing. Nor is any such point covered by the assignments of error in this Court."

The Government attempts to get over the hurdle of these cases. But its attempt is not successful. If the penal sections are declared invalid, it argues, there will be no new trial under these invalid penal sections. That is obvious. And equally obvious is the fact that, if the Government's contention be true that the petitioner has violated Section 35 of the Criminal Code, she may be indicted for the violation of that separate and distinct section. That a grand jury may refuse to indict does not change the orderly character of such a procedure under which a defendant is told what to expect and what he must defend, and under which no new rabbits may be unexpectedly pulled out of the hat at the very end of the journey.

2. *Counts 5 and 15 May Not be Sustained under Section 35 of the Criminal Code Because it Differs Materially from Section 1467 (a) of the Home Owners' Loan Act.*

On page 28, the Government's brief cites a number of cases to the effect that the endorsement on the margin of the indictment constitutes no part of the indictment, does not add to or weaken the legal force of its averments, and if it properly charges an offense under the laws of the United States, that is sufficient to sustain it, although the representative of the United States may have supposed that the offense charged was covered by a different statute.

But the substance of the ruling in these cases is that where the facts alleged show a violation of several sections and the indictment does not specify the section under which it is drawn—except possibly by indorsement on the margin or caption—then the indictment, particularly on demurrer, will be upheld if there is any statute which can sustain it.

In our case, the very language of Section 1467 (a) of the Home Owners' Loan Act, as to false statements, is followed in Counts 5 and 15 of the indictment; the very act as amended in April 27, 1934 is mentioned; and at the end the precise title and section of the United States Code is set forth. Clearly, where a specific statute is so definitely earmarked, no other statute can be substituted in its place.

And consider the palpable injustice which would be done to the petitioner if Count 15 were to be sustained under Section 35 of the Criminal Code. Before its amendment in 1934, intent to cheat, swindle or defraud the United States or any Corporation in which the United States was a stockholder was an essential element of the charge under Section 35 of the Criminal Code. In Count 15, under Section 1467 (a) of the Home Owners' Loan Act, there is no such allegation and no such provision in the section itself. Nor is that all. Under Counts 6 and 16 of the indictment, Sec-

tion 338, Title 18, U. S. C. the petitioner was charged with attempting to use the mail and the false statements to defraud the H. O. L. C. and the homeowners. While the mailing was proven, both these counts charging fraud were dismissed by the Government on its own motion at the end of its case. *In short, the evidence proved that the petitioner was not a cheat and a fraud and that she had not made the false statements to swindle anybody.*

She may still have made the incorrect or false statements to influence the action of the Home Owners Loan Corporation, but there was no intent to cheat and defraud. That decisive fact has been established by a full trial. After the Government by its own motion to dismiss counts 6 and 16 has conceded that the petitioner did not make either statement with a fraudulent purpose, it would certainly be a denial of every concept of a fair trial to permit it to shift her conviction to a statute branding the petitioner as a cheat, a swindler and a fraud. Surely, even the Government should be estopped from perpetrating such a wrong.

The Government endeavors to justify its course by saying that the misstatement might inflate the loan and default be made more likely (Br. 31). Such an argument overlooks completely the practical conduct of the business of appraisal by the Home Owners' Loan Corporation. The precise amount to be given a second mortgagee played no part in its appraisal or loan. Other independent factors determined that issue completely.

And while Sec. 35 of the Criminal Code was amended in 1934 by omitting the phrase as to cheating, swindling and defrauding, that would not sustain Count 5, also based on another misstatement by the petitioner as to the amount due on a second mortgage. There is no allegation about the purpose to influence the action of the Home Owners' Loan Corporation in Section 35 of the Criminal Code. And in

Count 5, there is no allegation that it involves a matter within the jurisdiction of the Home Owners' Loan Corporation. If indicted under Section 35 of the Criminal Code, the defendant could challenge the jurisdiction. And there is no allegation in Count 5, that the U. S. is a stockholder of any corporation. Only by omitting essential allegations of Count 5, as to purpose, and by rewriting a new count with several of the essential allegations contained in Section 35 of the Criminal Code, could you reshape the present indictment under this new section.

And if this impossible feat could be performed, the history and meaning of Section 35 of the Criminal Code, despite the amendment, indicate that it deals with matters requiring a pecuniary loss, which sharply differentiates it from the section of the Home Owners' Loan Act.

3. *Since the Government Did Not Object to Withdrawal of Plea of Guilty as to Count 12, it is Now Estopped, and Besides for Appeal Purposes a Plea of Guilty is the Equivalent of a Verdict by a Jury.*

The wisdom of not permitting the Government to spring new points in this Court is again convincingly established in the matter of the withdrawal of the plea of guilty as to Count 12. As the Government did not object, the record naturally does not disclose the circumstances justifying the withdrawal, the comment of the judge that the defendant was not at fault, and that the lapse of time was due to the court's own action in adjourning the sentence beyond the ten day period. The Government acquiesced in the Court's decision, proceeded to trial, obtained a conviction and it should be absolutely estopped from reversing its own conduct and acting as if there had been no trial.

The cases mentioned by the Government do not sustain its claim that the ten day rule as to the withdrawal of pleas of guilty is mandatory under all circumstances. *Ex parte*

Jordan, 94 U. S. 248, relates to the allowance of an appeal. "Shall be allowed" means "must be allowed". *Escoe* v. *Zerbst*, 295 U. S. 490, construed the phrase—"probationer shall forthwith be taken before the Court", and decided that he could not be deprived of this privilege.

Besides, the Government confuses a plea of guilty with an ordinary consent judgment in a civil action. A plea of guilty does not prevent the defendant from assailing the indictment. The courts have repeatedly held that a defendant, after a plea of guilty, is in the same position in respect to matters reviewable by appeal as though he had been found guilty by verdict of a jury. *Kachnic* v. *U. S.*, 53 F. (2d) 312, 315; *Roberto* v. *U. S.*, 60 F. (2d) 774, 775; *Spirou* v. *U. S.*, 24 F. (2d) (C. C. A. 2nd) 796, 797. And by implication, while the point was not argued, the same procedure was followed in *Rosenthal* v. *N. Y.*, 226 U. S. 260. This Court considered the constitutional points which the defendant presented, with the exception of a new point raised for the first time, although the defendant had pleaded guilty. The principle established by these criminal cases clearly differentiate the three civil cases cited by the Government, *Nashville, etc., R. R.* v. *U. S.*, 113 U. S. 261, 266; *U. S.* v. *Babbitt*, 104 U. S. 767, 768; and *Pacific R. R.* v. *Ketchum*, 101 U. S. 289, 295. In substance, they hold that a decree in equity which appears to have been rendered by consent is affirmed, without considering the merits, and that no errors would be considered which were in law waived by such consent.

Nor does the criminal case of *U. S.* v. *Berman*, 88 F. (2d) 645, help the Government's claim. The defendant requested, after conviction and after the suspension of sentence, that a fine of $1.00 be imposed, and the Appellate Court decided that he could not complain of the part of the judgment which he not only consented to, but actually asked for.

Finally, the undisputed facts proven at the trial show that the petitioner is not guilty of any crime whatsoever under Count 12. If there is any reversible error in this record it is the conviction under this Count. The contract made to adjust payments on the first and second mortgage, the services rendered, the payment of the $50.00 to the first mortgagee and the withdrawal of the petitioner from the transaction on June 11, 1934, are established by the testimony of the homeowner. At that time, the homeowner was not even an applicant for a home loan. At the end of the month—after the petitioner had done what she could and had withdrawn because she could not negotiate successfully for any modification with the first mortgagee—the homeowner filed her application for a loan. Where is the crime? Where is the violation of any law? Should not the Government itself, where the innocence of a defendant is conclusively demonstrated, at least as to this count, be the first to move for its dismissal rather than to twist a conviction out of it at all hazard?

Point II.

The two penal sections of the Home Owners' Loan Act cannot stand, if general act falls, and the petitioner may attack the general provisions and is not estopped by any act of hers from attacking them.

1. *Penal Sections Not Separable, if Main Act Invalid.*

The Government attempts valiantly, but unsuccessfully it seems to the petitioner, to prove that even though the tree falls, the branches may still rest separately in the air, unsupported by the main trunk. It mentions the separability clause. But that says in effect, that a branch or clause, if invalid, may be lopped from the valid trunk. It does not

say that you may start to segregate an act into a variety of parts regardless of the validity of its main system.

That other statutes may be passed separately to punish an attempt or a conspiracy to defraud the United States or to cause corrupt administration of certain acts of Congress is conceded. And an indictment under such separate sections of the Criminal Code may be valid regardless of the validity of the particular agency involved. That in substance is a summary of the rulings in the cases cited by the Government. *U. S.* v. *Schor*, 13 F. S. 399; *U. S.* v. *Harding*, 81 F. (2d) 503; *Madden* v. *U. S.*, 80 F. (2d) 672; *Langer* v. *U. S.*, 76 F. (2d) 817; *U. S.* v. *Solder*, 10 F. S. 944; *U. S.* v. *McDonald*, 10 F. S. 948.

The existence of these separate statutes against defrauding the United States or any agency or corporation in which it is a stockholder, instead of buttressing the Government's argument of separability, negatives its claim. Knowing the existence of the separate statutes to protect the funds of the United States, Congress relied, it could be argued, on these separate statutes, which it knew would stand regardless of the legal fate of the particular agency or corporation. And in addition to these independent statutes, standing apart on their own feet, it included the special penal sections in the Home Owners' Loan Act, and by their very inclusion indicated that these special penal sections were to be coupled with the main act.

Admittedly, Congress would not have passed the two penal sections without the general provisions of the Act. If no H. O. L. C. had been created, there would have been no Section 1467 (a) as to false statements, and no Section 1467 (e) as to charges. Speculation as to what Congress might have intended after the passage of the Act is a novel suggestion on the part of the Government, but it leads into

a bog where one flounders without any hope of establishing any definite footing.

Besides the admitted intention of Congress before the passage, the separability argument does not pass the second test, namely, that the penal sections cannot stand and be enforced apart from the Main Act. If there is no valid Home Owners' Loan Corporation to be influenced and no valid corporation to which applicants may go for loans, the two penal sections, in so far as they prohibit the influencing the action of this Corporation and the charging for services to applicants for loans of this corporation, are without meaning.

2. *As Main Provisions Affect the Petitioner, She May Contest Their Validity.*

The Government's concentration on its array of cases (Br. 57-59) apparently has made it overlook this simple fact. The petitioner does not dispute that: under the Railway Labor Act, the railroad can complain only of the infringement of its own constitutional immunity, not that of the employees; that under Workmen's Compensation Act, the employer cannot urge a wrong to the employee; an owner of automobiles moving in caravans whose business is properly taxed cannot complain of the imposition of the tax on a business which he does not do; companies receiving just compensation are not entitled to have higher rates merely because of the plight of less fortunate competitors; petitioner who has been excepted from a setback ordinance cannot complain of its vagueness; taxpayer paying a stamp tax on exclusively local transactions cannot allege interference with interstate commerce; residents of District of Columbia cannot attack tax on the ground that it is invalid as to non-residents; objections to penalties cannot be raised in a suit not to enforce penalties; and

generally that one who would strike down a statute must show that he is within the class of persons with respect to whom the act is unconstitutional and that the alleged invalid feature injures him. *Virginian Ry.* v. *Federation*, 300 U. S. 515, 558; *Jeffrey Mfg. Co.* v. *Blagg*, 235 U. S. 571, 576; *Morf* v. *Bingaman*, 298 U. S. 407, 413; *Ætna Ins. Co.* v. *Hyde*, 275 U. S. 440, 446; *Gorieb* v. *Fox*, 274 U. S. 603; *Hatch* v. *Reardon*, 204 U. S. 152, 160; *Heald* v. *District of Columbia*, 259 U. S. 114; *Rail Coal Co.* v. *Ohio Industrial Commission*, 236 U. S. 338, 350.

While that is not a complete summary, it gives the chief samples cited by the Government. No argument is needed to point the difference. The petitioner is not advancing some special discrimination nor some particular immunity belonging only to a certain group nor some restricted defect. As to the general provisions of the Act, her attack is fundamental and sweeping in its scope. She claims that Congress has no power to create a corporation to conduct a private enterprise, that such an enterprise invades the local rights reserved to the people and the powers reserved to the states, and cannot be supported under the taxing-for-the-general-welfare clause.

Such an attack is available to anybody affected by the Act. The answer of the Government that only the penal sections touch the petitioner is inadequate. If the penal sections, although valid in themselves, should fall because of the invalidity of the Main Act, it is the invalidity of the Main Act which will free the petitioner from the liability of going to jail for one year and a day.

3. *Petitioner Not Estopped from Challenging Main Act.*

Again, the Government (Br. 60-63) bases its claim of estopped on a series of cases which have nothing whatever to do with this appeal. There is no argument possible over

cases which hold that: a company commencing a statutory proceeding for the appraisal of their stock, which is still pending, waived its right to assail the validity of the statute; an employer who voluntarily elects to come under a state Workmen's Compensation Act and accepts its benefits, cannot assail its burdens as unconstitutional; obligors on bond, staying execution, are estopped to assert invalidity of statute in subsequent litigation; plaintiff who had connected its premises to sewer cannot contest the validity of the sewer or the validity of the tax; and that it is true that one cannot in the same proceeding both assail a statute and rely upon it nor can one who avails himself of the benefits conferred by a statute deny its validity. *Wall* v. *Parrott, Silver & Copper Co.*, 244 U. S. 407, 411; *Booth Fisheries* v. *Industrial Commission*, 271 U. S. 208, 211; *Daniels* v. *Tearney*, 102 U. S. 415, 421; *St. Louis Co.* v. *Prendergast Co.*, 260 U. S. 409, 473; *Eliason* v. *Wilborn*, 281 U. S. 457.

That partial list of cited cases carry on their face their distinguishing marks. The petitioner is not a homeowner who applies for a loan under the Act. She was in two instances a second mortgagee and usually a mortgage broker. As second mortgagee in two cases, upon request of the H. O. L. C., she offered to release her second mortgage, in short to sell a satisfaction piece for a certain amount in bonds. The relation of buyer and seller in an ordinary business transaction between a corporation and an individual is not the availing of a benefit under a statute. In order to assert that a statute provides a benefit for a person he must be included within the circle of beneficiaries who may apply for its expected benefits. The only one who can apply is a certain group of homeowners. They are the only legal beneficiaries with whom the statute is concerned. That in making the loan to the homeowner, the H. O. L. C. sometimes had to do business with second

mortgagees and bought certain papers from them does not make them the recipients of benefits under that statute.

And in criminal cases the principle of estoppel, based at best on a shadowy claim of benefits, should be applied with the utmost strictness. The very cases cited by the Government to prove that estoppel is recognized in criminal cases reveal how limited is the recognition. In the first place, several of the alleged criminal cases, are not criminal at all. In *State* v. *Board of Police Commissioners,* 56 N. J. L. 258, the Court ruled that in ouster proceedings, a police commissioner could not attack law creating the board under which he served. *Ayers* v. *Newark,* 49 N. J. L. 170, was a similar proceeding and upheld the same rule. And in the second place, cases like *State* v. *Collins,* 225 Mo. 633, and *Hunt* v. *State,* 186 Ind. 644, merely establish the sensible principle that if a prisoner accepts the terms of parole, he cannot, when it is revoked, assail its validity.

The tendency to restrict is evident in *State* v. *Stone,* 46 La. Ann. 147, 150. Since the defendant had voluntarily given samples of milk, he could not object to the introduction of proof by the chemist. But the Court added that consent to a test did not make legal what may be illegal in the ordinance under which the proceedings were instituted and the fine imposed. And *Kluczek* v. *State,* 115 N. J. L. 105, holds that objection to jurisdiction over the person is waived by taking part in a trial on the merits.

The two cases of *Ingles* v. *People,* 90 Colo. 51, 56, and *Jannett* v. *Windham,* 109 Fla. 129, 130, cover a very narrow field. The first holds that if a defendant complies with the statute as to an insanity plea, and enters the plea as required, without objection, he cannot later contest its validity. The *Jannett* case, which upheld the validity of the statute on rehearing, is of doubtful correctness since it seemed to hold at first that a lender could not challenge a provision requir-

ing a license because the statute conferred a benefit in the form of an exemption from the usury laws.

Nor do all proceedings under a statute constitute an estoppel even in civil cases. In *Newark* v. *Central R. R.*, 267 U. S. 377, 385, the Company applied to board for the approval of its plans for a proposed bridge. When its application was denied, it was free to insist that such approval was not required. No element of estoppel was found in *Buck* v. *Kuykendall*, 267 U. S. 307, 317, where a bus owner applied for a certificate of convenience, which was denied. The Government attempts to distinguish these cases by arguing that a license is not a benefit. And if that be so, a sale that never takes place is hardly a very substantial advantage.

In conclusion, the petitioner as mortgage broker was not employed by the Home Owners Loan Corporation. She was hired by homeowners to represent them in dealing with various mortgagees; she continued her ordinary mortgage activities exactly as before; and in two instances, at the request of the corporation, offered to sell two satisfaction pieces to the corporation, offers which were never accepted. Under these circumstances, there can be no estoppel on the theory of benefit or availing oneself of the provisions of the statute.

Point III.

That the Government can protect against fraud and exploitation does not justify the same wide and general protective devices and punishments where fraud and exploitation do not exist.

That the United States may protect its funds and its beneficiaries or wards from exploitation is admitted. Where there is a real danger, it may spread a wide net. In bonus cases, in war risk insurance cases, wherever the Government provided a fund and the beneficiary received a substantial sum in cash, the very existence of this money

tempted greedy and clutching hands. In such cases, the protective net had to be wide, high and very tight.

The justification for treating people as criminals who violated these regulations arose from the obvious danger to the funds. But making the violation of administrative regulations a criminal act is a very serious business. Where the peril is very faint or practically non-existent, Congress cannot invade a broad field of private activity and transform overnight what was legal into a criminal act. It cannot because such criminal making power is not reasonably necessary to protect its funds or the Home Owners Loan Corporation.

This distinction can be made clearer by comparing the ordinary bonus case. There the beneficiary is entitled to receive a sum in cash. The procedure to obtain the benefit in cash is usually very simple, and would not justify a substantial fee. Still, the existence of the money may induce the agent or attorney to overcharge. Congress to protect its wards limits the permissible charge. It deals with the beneficiary as the recipient of a fund of money which may be in serious danger. Now compare the homeowner who applies to the Home Owners Loan Corporation. There is no money distributed to the homeowner. The H. O. L. C. pays off existing encumbrances. Consequently, since the homeowner does not receive any cash whatsoever, the danger of exploitation is eliminated. As to the usual services of appraisal, title search, closing of title, the persons are all employed and paid by the Corporation.

With no money paid to the homeowner and all persons performing all of the usual services employed and paid by the Corporation, the possibility of exploitation was completely removed. By these practices, the Corporation effectively protected itself and the homeowner. Not a penny of its money was used except to pay persons employed by it,

whose fees it fixed, or to pay existing liens or to pay persons who did repair work which it approved.

The only remaining field was that of the mortgage broker hired to reduce first and second mortgages or to obtain modifications of terms or stay of foreclosures. Since the Home Owners Loan Act did not stay foreclosures nor automatically modify the terms nor reduce the amounts of mortgages, this was a field in which the owner was free to hire whom he pleased. The broker so hired was not paid by the H. O. L. C., nor with any funds of the United States. The homeowner did not receive a penny for any such purpose or for any purpose. The broker so hired could get paid only by performing some benefit to the owner. For example, the broker, as the petitioner did, brought about a reduction in the amount of the mortgages and in those cases she became entitled to receive compensation from the owner. Some tangible assistance, some lightening of the owner's burden, had to be obtained before the owner in distress would be able to pay the broker. To make such acts, not of exploitation, but of considerable benefit to the homeowner, a crime, we submit, is beyond the power of Congress.

This is equally true of Section 1467 (a) as to false statements. Where the danger to the funds of the United States or the lending Corporation is considerable, the penalty arm should be ready to strike hard. But where there is no fraud, as admittedly there was none here, where there is no loss and no impairment of the security, where the loan does not depend on any statement in any second mortgagee's consent and where in practice all such guesses are adjusted at the closing, what you are confronted with under both sections is not a criminal matter at all, but a matter of administrative regulations.

In such situations, the rule *de minimis non curat lex*—which the Government says is not followed in criminal

cases—should be followed to avoid the making of criminals for trifling reasons. That the overstatement of the balance due in percentages is large does not alter this principle. It was a common practice to guess at the balance due on 2nd mortgages, to guess at the amount due for interest, for taxes, and to be on the safe side, the easy thing to do was to put down either the original amount of the mortgage or some large sum, and then to figure out exactly when the receipts were produced by the owner at the closing, if it ever reached that point. It was at that time, that the matter was taken seriously, and it is from that time only that everybody concerned should be held to strict account. And if the Corporation wanted second mortgagees to be more accurate before that time, it should have issued a warning that any inaccuracy in figures might subject the maker to prosecution.

Without some such clear and definite warning to second mortgagees under Section 1467 (a) and to brokers under Section 1467 (e) no person should be treated as a criminal for a violation which has resulted in no loss to anyone.

As to the claim of vagueness, concerning Section 1467 (e), the Government has pointed out that one count refers to an act before its amendment in April, 1934. That is true. But the count itself refers to the section as amended. And because of that we have so considered this section. However, to avoid any misunderstanding, the petitioner contends that the section is equally invalid before amendment in April, 1934, and after the amendment, and for the same reasons.

Point IV.

Since the H. O. L. C. has already foreclosed or started foreclosure in 15% to 20% of its loans, it can hardly be treated as an agency for the "Protection of Home Ownership" or of "Charity", and a private enterprise does not cease being private because it produces some benefits.

There are scattered through the Governments brief phrases, such as "the protection of home ownership", "preserving its citizens from eviction from their homes", "the relief of more than a million distressed home owners", and when such phrases are repeated they are almost self intoxicating. From the Government's account of the H. O. L. C., one would get the impression, to apply a statement of Prof. Robinson, used in another connection ("The Folklore of Capitalism" by Prof. Arnold, p. 143) that if there had been no such corporation "the people would have climbed trees and thrown coconuts at each other."

The petitioner does not wish to belittle the H. O. L. C. She admits that it is better for a home owner to pay 5% rather than 6%, and probably better to have a long term contract rather than a short term. But the Corporation as a legal entity must be judged by what it is empowered by law to do and what it does under the law. Nowhere, for example, is the dread phrase "foreclosure by the H. O. L. C." mentioned in the Government's brief. Why this conspiracy of silence? Is it not a well known fact, published by the H. O. L. C. itself, that it has foreclosed or started to foreclose between 15% to 20% of its loans? It has entered deficiency judgments exactly as other mortgagees have done. And how many more foreclosures it will carry through—whether a majority or more—nobody can tell.

Nor is that all. It is a serious question whether the fumbling and the blunders necessarily made in the organiz-

ing and administering in a hurry any such large organization do not offset most of the benefits it may have conferred. For without it, the local institutions and the states would have acted and their judgment both as to appraisals, renewals and foreclosures probably would have been wiser than those made by agents suddenly catapulted by chance into office. Perhaps there might have been a few more foreclosures, but even that is speculative, and besides it is a doubtful policy to prolong the agony when foreclosure is inevitable, and often this may result in the shifting of ownership to other individuals equally deserving and possibly more enterprising.

And if the balance of benefits should be a bit more on the side of the Corporation than the petitioner believes, that would not change its essential private character. Every large private enterprise, every large private bank, every large motor Company, for instance, stabilizes employment, and by the wages of its thousands of employees keeps up rental values, promotes home ownership, and might be labelled adjuncts of this and that system. Still, they would be private enterprises, and no matter how wide their circle of benefits, their character would not be changed. A big private enterprise is just as much a private enterprise as a small one.

Until that private enterprise is endowed with public functions as in the *Farm Land Bank* case (*Smith* v. *Kansas City Title Co.*, 255 U. S. 180) it is just a private business of loaning money on private homes at 5%. The absence of public powers is not "too rudimentary a touchstone" (Br. 85); their absence means that power has not been conferred and until such power is conferred, the corporation cannot be treated as if they had been granted. And absence of power cannot be waived because the private institution is of benefit to the National banking system nor because our whole financial system is "One which is closely and deli-

cately integrated'' (Br. 88). Public power, not granted, or which does not exist, cannot be created by analogies nor by circles of influence, nor even by the assumed dire necessity for the creation of such a public agency.

The petitioner stands corrected as to the date the Corporation was authorized to purchase bonds of the Home Loan Bank. It was in April 27, 1934, and not in 1935. However, that was merely what any other bank or mortgage company could do. It was not required nor directed to do so as in the *Farm Land Bank* case. It was never declared a fiscal agent or depositary of the United States and therefor it is not the creature of the fiscal powers of Congress.

The basic confusion in the Government's argument is that there is no violation of the 9th and 10th Amendments because the corporation constitutes ''charity and not duress'' (Br. 102). If the H. O. L. C. loaning on first mortgages at 5% is ''charity'', what is the Governments definition of a business contract? Petitioner admits that the contract is voluntary. Her contention is not based on coercion, but on the invasion of a field of private activity—that of loaning money to private individuals on their private homes—and that this field cannot be invaded or entered by the Federal Government under the guise of ''general welfare''.

Nor is it an answer to say that if the United States is exercising the general welfare power it cannot be violating the 9th and 10th Amendments. That would be true if the general welfare clause were an omnibus clause without limits and under which the Federal Government could conduct any large private business in the country. It is at this point that we divide. Petitioner does not believe that the general welfare clause can be construed as a general power to incorporate any large business enterprise to take over or to invade a field of admittedly private activity. Unless there exists some such demarcation, there is no limit to

Federal activity and there is no meaning left in the words of the 9th and 10th Amendments and we have not a Federal system but a rapidly emerging totalitarian one.

Conclusion.

For the foregoing reasons, together with those in the original brief, we respectfully submit that the judgment of the courts below should be reversed.

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